superior to those provided by cable programmers. Broadcasters may use their digital signals to transmit interactive program guides that compete with guides offered by cable; they may provide "multichannel" programming or data supplements to DTV free of charge; or they may occupy channel space that cable would prefer to use for fee-generating interactive services such as voice telephony. Without digital must-carry requirements, cable operators would be free to promote their own digital services while effectively shutting broadcasters' free DTV signals out of cable subscribers' homes – and history has shown that, given the chance, that is precisely what some cable operators will do. Thus, reliance on the "marketplace" is not a viable alternative to advance the governmental interest in promoting the DTV transition and preserving local broadcasting.

b) Cable Subscribers Will Not Rely On Over-The-Air DTV Transmission.

Several cable commenters argue that digital must-carry requirements are not necessary because consumers will have access to digital broadcast signals over the air. They assert that consumers will install outdoor antennas and utilize A/B switches to access DTV programming while relying on cable to access other programming. The commenters claim, predictively, that technical improvements in input selector features and new regulations preempting restrictions on outdoor antennas will result in a dramatic change in consumer behavior that will suddenly make cable carriage unnecessary. A few make bare assertions

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(continued . . .)
Status of Competition in Markets for the Delivery of Video Programming, CS Report No. 98-18 (adopted Dec. 17, 1998, summary released Dec. 18, 1998) ("*Fifth Annual Report*").

that consumers willing to invest in DTV sets will be more likely to purchase outdoor antennas.[62]

These unsupported claims do not support the conclusion that DTV carriage requirements are not needed. First, it is unclear that the technical improvements in A/B switches predicted by the commenters have or will in fact take place. As MSTV noted in its initial comments, it is our understanding that less than half of the DTV sets produced will have input selectors on their remote control devices.[63] And many consumers took down their outdoor antennas once they subscribed to cable (often at the encouragement of the cable operator), and there is no evidence that they will expend the effort to reinstall those antennas to access DTV signals not carried on cable.[64]

More importantly, the cable industry's assertions fly in the face of the consumer behavioral evidence that Congress amassed and considered when it enacted the must-carry requirements in 1992. Congress found that input selectors were not adequate substitutes for cable carriage, both because of "technical shortcomings" and "lack of consumer acceptance."[65] History had shown that cable subscribers would not install outdoor antennas and resort to A/B input selector switches to access over-the-air signals. This conclusion was reinforced by a 1991 study that showed that even after several years of

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[62] *HBO/TBS Comments*, at 18-29; *Adelphia Group Comments*, at 19-21, 33-34; *Ameritech Comments*, at 26-28; *CATA Comments*, at 26-29; *Discovery Comments*, at 25-30; Comments of Lifetime Entertainment Services, CS Docket No. 98-120, at 12 (Oct. 13, 1998) (*"Lifetime Comments"*).

[63] *See, e.g., MSTV Comments*, at 49.

[64] *See* Comments of the Association of Local Television Stations, Inc., CS Docket No. 98-120, at 79 (Oct. 13, 1998) (*"ALTV Comments"*); Comments of the Association of America's Public Television Stations et al., CS Docket No. 98-120, at 48-49 (Oct. 13, 1998).

[65] *Turner II*, 520 U.S. at 221.

providing consumers with A/B switches and information on their use, "only 11.7 percent of all cable-connected television sets were attached to an antenna and had an A/B switch. Of the small number of households possessing the switch, an even smaller number (only 38 percent) had ever used it."[66] The introduction of DTV will not change this basic fact of consumer behavior: consumers want to rely on a single, simple source for video programming, and those accustomed to receiving analog television signals over cable are not likely to access such signals over the air.[67] In fact, as cable systems employ digital technology to expand their service offerings and offer new features (such as interactive EPGs) that are dependant on cable set-top boxes and other cable equipment, it is even *less* likely that consumers will be sufficiently willing to rely on input selector switches (which would "turn off" set-top box features) that carriage requirements will become unnecessary.

c) Carriage of Analog Signals Alone Is Not Sufficient To Serve The Important Government Interests Implicated In The 1992 Cable Act And The DTV Transition.

Several cable operators contend that digital must-carry rules are not needed to serve the important government interests underlying the *1992 Cable Act* because those interests – preservation of local broadcasting, widespread dissemination of information from a multiplicity of sources, and fair competition – will be adequately served by the continued

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[66] *Turner II*, 520 U.S. at 220-221 (citing NAB survey on A-B Switch Availability and Use (Sept. 23, 1991)).

[67] This conclusion is reinforced by the considerable legislative efforts of the DBS industry to obtain the right to carry local broadcast signals into their local markets, so-called "local-into-local" retransmission rights. The inability of DBS providers to offer local signals as part of their programming packages is seen as a significant obstacle to their penetration into the MVPD market, *Fourth Annual Report*, 13 FCC Rcd at 1072-73, despite the fact that most DBS boxes are equipped with relatively simple input selector devices, because consumers do not want to have to switch between programming sources.

carriage of analog broadcast signals during the transition to digital.[68] These commenters contend that mandatory carriage of analog broadcast signals – which will continue until digital penetration is sufficient to justify turning off the analog service – will provide sufficient advertising revenue to preserve the economic viability of local broadcasting during the transition.[69] Some also argue that digital broadcasting will offer broadcasters additional sources of revenue that can be used to sustain the digital stations during the transition.[70]

These arguments are off base, as a hypothetical will illustrate. Assume that TV set penetration in a particular market reaches 30% and only a local station's analog signal is subject to must-carry. If none of the cable homes in the market receives the station's DTV signal over cable and all of the cable subscribers prefer to watch digital cable programming rather than the local station's analog programming (and, as occurred in the analog context, are unwilling to utilize an input selector switch to access the local station's

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[68] *See, e.g. Adelphia Group Comments*, at 11-14; *Discovery Comments*, at 17.

[69] *See, e.g. Ameritech Comments*, at 13-15, 20-21; *MediaOne Comments*, at 38-40; *NCTA Comments*, at 23-26; *TCI Comments*, at 8-11; Comments of Time Warner Cable, CS Docket No. 98-120, at 5 (Oct. 13, 1998) (*"Time Warner Comments"*). Ameritech claims, on grounds not disclosed, that carriage requirements are unnecessary because broadcasters have thus far been able to obtain financing for digital facilities without a guarantee of cable carriage. This claim does not reflect the reality of the obstacles facing the broadcasting industry as it tries to build out and operate digital facilities. *See, e.g., NAB Comments*, App. B (Broadcaster Declarations). Even if the strongest network stations in the largest markets, which are the only stations that have yet been required to begin building out digital facilities, have been able to construct those facilities without a guarantee of cable carriage, the fact is that those broadcasters have more leverage than other stations and are better able to bear the financial strain of constructing and operating digital facilities. Moreover, widespread financing difficulties are not necessarily a prerequisite for digital cable carriage requirements. They are simply an additional sign of the debilitating effect that the absence of must-carry could have on the broadcast service's health and viability through the transition.

[70] *See, e.g., MediaOne Comments*, at 38-40; *TCI Comments*, at 8-11.

DTV signal), the station's advertising revenue from its cable-carried analog signal would drop by 30% while revenue from its exclusively over-the-air DTV signal, with its limited access to television households in the market, would not have increased commensurately. Carrying the hypothetical through to the end of the transition, just before analog signals are shut off, the station's advertising revenue could be reduced to perhaps 10% of its pre-transition level. But even the 30% erosion (or something far less) in advertising revenues would probably be enough to drive sports, entertainment and high quality news programs and performers, writers and talent to other media, which would make it even harder for local stations (analog and digital) to compete for viewers. Free television's cost-per-thousand, advertiser-supported economics make it particularly vulnerable to this sort of downward death spiral that the absence of must-carry could trigger in the digital environment.

Moreover, if broadcasters are entitled only to analog carriage during the transition, cable operators could (and likely would) eventually fill their systems with digital cable programming and services, while relegating local broadcasters to the analog service. Cable could use the technical superiority of digital services to draw cable subscribers away from local broadcast programming, eroding local broadcasters' audiences, depressing advertising revenues and weakening the broadcast industry as it tries to transition to DTV. This would strongly undermine the government's interest in preserving the viability of the local broadcast service – both analog and digital – through the transition.

The unsupported claim that digital services will provide broadcasters with sufficient additional revenue sources to carry them through the transition also must be rejected. Revenue-generating services are undeveloped and untested, and accordingly cannot be considered a reliable source of revenue to support the costs of digital

broadcasting. In addition, the argument essentially forces broadcasters to rely on revenue-generating services to support their DTV stations, since in the absence of cable carriage DTV viewership probably will be too low to garner substantial advertiser support. This would substantially harm the public interest by undercutting the development of free digital services that could be delivered to viewers either through cable or over-the-air.

2. A Capacity-Based Must-Carry Scheme Would Promote, Rather Than Hinder, Programming Diversity And Local Service.

a) Cable Programmers And Operators Would Not Be Unduly Burdened Under A Capacity-Based Approach.

Cable programmers and operators argue that digital must-carry requirements will impose a tremendous burden on the cable industry, eating up scarce capacity and forcing cable programmers off cable lineups in droves. These are the same arguments that the cable industry made when it challenged the analog must-carry rules. Congress and the Supreme Court found that substantial evidence, which was later reinforced by experience, contradicted these assertions. Now, as then, cable has overstated the impact of must-carry requirements.

In analyzing whether must-carry requirements would be too burdensome to satisfy constitutional scrutiny, it is important to remember that content-neutral must-carry regulations "are not invalid simply because there is some imaginable alternative that might be less burdensome on speech."[71] Instead, such regulations are constitutionally permissible as long as the restriction on speech is "not substantially broader than necessary to achieve the government's interest."[72] And the scope of the permissible burden depends on the

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[71] *Turner II*, 520 U.S. at 217.

[72] *Id.*

particular governmental interest to be advanced. Thus, where Congress requires carriage of local broadcast signals with the goal of "prevent[ing] any significant reduction in the multiplicity of broadcast programming sources available to noncable households,"[73] the burden that may be imposed is that which is commensurate with the legislative purpose (*e.g.*, up to one-third of system capacity). The burden that will be imposed by a flexible, capacity-based must-carry requirement is well within that standard.

Cable commenters argue that digital must-carry requirements would impose an undue burden on cable because they would "double" cable operators' carriage obligations.[74] But digital signals will go on the air gradually over the next several years, staggered according to the Commission's buildout schedule. Thus, digital carriage obligations will increase incrementally over time – they will not simply double overnight. In addition, the carriage obligations will accrue at the same time that cable systems are upgrading capacity and introducing digital compression technology to increase the number of channels that can be carried on their systems.[75] Indeed, cable operators have more than doubled their capacity in recent years. Many systems have already upgraded and/or added digital capability. Cable systems in the larger markets, where carriage obligations will be most strongly and immediately felt, generally are upgrading their systems to 550 or 750 MHz, and many are adding digital capacity, which can carry at least two DTV signals within a 6 MHz channel.[76] Thus, most cable systems have or soon will have sufficient capacity to

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[73] *Id.* at 193.

[74] *See, e.g., Adelphia Group Comments*, at 17-18; *Ameritech Comments*, at 22-24; *NCTA Comments*, at 28-32; *Time Warner Comments*, at 8; *HBO/TBS Comments*, at 27-28.

[75] *MSTV Comments*, at 50-51; *NAB Comments*, at 32-33; *ALTV Comments*, at 56-62.

[76] According to CEMA, existing cable capacity far exceeds what is required to carry both digital and analog signals during the transition: "[T]he capacity of digital signals depends

(continued...)

support the carriage of digital broadcast signals without disturbing existing cable programming lineups or unduly infringing on their rights to choose the programming carried on their systems.[77] And, it is important to note, the total carriage requirements imposed on any cable system will never exceed the one-third capacity limit, which the Supreme Court has held does not impose an undue burden.[78]

Finally, MSTV's capacity-based approach would further diminish any burden to cable operators from digital must-carry requirements. The proposal takes into account cable capacity and upgrade schedules to assure that digital carriage obligations are imposed on cable operators only as they develop the capacity to accommodate the signals without disruption to their existing programming.

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more on the cable operator's allocation of bandwidth between analog and digital than on absolute finite bandwidth of the cable." *CEMA Comments*, at 15-16.

[77] Several cable commenters argue that the fact that cable is upgrading and increasing capacity does not justify giving broadcasters must-carry rights. They note that there are many cable programming services also seeking carriage, and they argue that cable programmers should be able to compete with broadcasters for carriage on an equal footing without broadcasters having a must-carry "advantage." Cable operators also contend that they should have the flexibility to allocate the increased capacity in which they are investing as they see fit. *See, e.g., MediaOne Comments*, at 23-25; *NCTA Comments*, at 40-44; *Discovery Comments*, at 7-9; *HBO/TBS Comments*, at 29-32.

MSTV's limited must-carry proposal does not give broadcasters an unfair advantage over cable programmers. Cable operators are often vertically integrated with those programmers and have a financial incentive to carry them rather than broadcasters. Moreover, broadcasters have public interest obligations that cable programmers do not have, and Congress has found that broadcasters provide a unique service that should be preserved. MSTV's carriage proposal ordinarily will not bump existing cable programming, but will ensure that broadcasters are not excluded from new cable capacity in favor of pay-per-view channels and other uses that bring financial benefit to cable operators without necessarily serving the public interest.

[78] *Turner II*, 520 U.S. at 216.

b) Digital Must-Carry Requirements Would Preserve The Benefits Of Free Local Broadcast Television Service And Promote Programming Diversity.

Cable programmers and operators argue that digital must-carry requirements will harm programming diversity because they will require cable operators to bump unique cable programming to carry "duplicative" analog and digital signals from a single broadcaster.[79] Programmers contend that imposing digital must-carry requirements in the midst of purported capacity shortages will inhibit the development of new cable networks and impair the ability of cable programmers to become and remain commercially viable.[80] As noted above, however, these arguments are premised on erroneous assumptions about the impact of digital must-carry obligations on cable programming. The flexible, capacity-based carriage proposal ordinarily will not require cable systems to bump existing programming and, particularly in light of existing and impending capacity increases, will not unduly harm programmers seeking carriage.

Moreover, to the extent that DTV carriage requirements make it more difficult for cable programmers to compete for carriage, this incidental burden is reasonable in light of Congress' determination that the public interest requires the preservation of a multiplicity of free broadcast sources of information for those who cannot or do not subscribe to cable. As the Supreme Court noted in *Turner II*, "[i]t is for Congress to decide how much local broadcast television should be preserved for noncable households, and the validity of its determination does not turn on a judge's agreement with the responsible

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[79] *See, e.g., Adelphia Group Comments*, at 15-16; *Ameritech Comments*, at 22-24; *Discovery Comments*, at 16-17, *C-SPAN Comments*, at 14-16; *GTE Comments*, at 18-20.

[80] *See, e.g., NCTA Comments*, at 28-32, 40-49, 52; *TCI Comments*, at 18-22; *Time Warner Comments*, at 9-10; *GTE Comments*, at 20-22.

decisionmaker concerning the degree to which the Government's interest should be promoted."[81] The Court upheld Congress' determination that must-carry requirements should be designed to preserve a multiplicity of local broadcast programming sources, noting that "[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communications, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression. . . . Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable."[82] Part of promoting that interest involves ensuring the continued viability of local broadcasting as it makes the required transition to digital service, which requires, as Congress concluded in enacting Section 614(b)(4)(B), extending carriage requirements to digital broadcast signals during the transition.

Several cable industry commenters cite Chairman Kennard's recent suggestion that the adoption of digital carriage requirements may depend on whether broadcasters are still "unique" with respect to the provision of local programming to argue that cable carriage requirements that "favor" broadcasters over cable programmers are not justified because cable programmers are also offering local programming.[83] We think that these commenters misread Chairman Kennard's statement, since basing the must-carry

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[81] *Turner II*, 520 U.S. at 193 (internal quotations and citations omitted).

[82] *Id.* at 194.

[83] *See, e.g.*, *NCTA Comments*, at 46; *Ameritech Comments*, at 16-17; *MediaOne Comments*, at 25; *Discovery Comments*, at 25.

determination on the *content* of broadcast programming would be inconsistent with the Supreme Court's teaching in the *Turner* cases.

In *Turner I*, the Supreme Court held that must-carry requirements are subject to intermediate scrutiny because they are content-neutral. Although the Court recognized that Congress had mentioned the value of broadcast programming in enacting the carriage requirements, it found that such references did not "cast any doubt on the content-neutral character of must-carry. That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as more valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable."[84] The Court concluded that the must-carry requirements were designed "not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that Americans, especially those unable to subscribe to cable, have access to free television programming – whatever its content."[85]

Thus, the must-carry requirements are justified because of the need to preserve the unique, free and locally-oriented *service* that broadcasters provide, not because of the *content* of particular local broadcast programming. The fact remains that over one quarter of Americans do not subscribe to cable (and households that do subscribe may not have all of their television sets connected and thus may still rely to some extent on over-the-

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[84] *Turner I*, 512 U.S. at 648.

[85] *Id.* at 649.

air service), and Congress concluded in the *1992 Cable Act* that the free over-the-air service should be maintained for those viewers that rely on it and that must-carry requirements were necessary to accomplish that goal. The Commission does not have the authority, based on the content of broadcast programming as compared to that available on cable, to reject Congress' conclusion.

Cable programmers also repeatedly make the point that they do not have the option of being distributed over-the-air, and must rely solely on distribution by MVPDs. Therefore, they argue, it is unfair to give broadcasters (who also have the option of being distributed over-the-air) a right to carriage while cable programmers are forced to compete for carriage on fewer available channels. The *Discovery Comments* further contend that the DTV transition would be *promoted* by requiring broadcasters to rely exclusively on over-the-air transmission, because if broadcasters transmitted HDTV signals over the air and cable programmers produced HDTV programming for distribution on cable, the total amount of HDTV programming available would be larger, and consumers would be more likely to conclude that there is sufficient HDTV programming to justify the purchase of an HDTV receiver.

These arguments must be rejected for several reasons. First, by and large, cable programmers will not be displaced because of digital must-carry requirements and, in light of capacity increases, will not face increased competition to the extent they claim. Second, although broadcasters *can* deliver their signals over the air, the reality is that nearly 70% of Americans receive those signals through cable and are not accustomed to relying on over-the-air reception. Thus, local broadcasters are nearly as dependent on cable carriage for their continued viability as are cable programmers; and cable operators have

anticompetetive incentives to discriminate against broadcast stations and favor cable programmers. Third, over-the-air broadcasting is the only source of programming for most of the 30 percent of Americans who do not subscribe to cable. If local broadcasters are weakened, viewers who rely on over-the-air service – and therefore have no alternative source of programming – will be harmed. Congress determined that preserving the strength of free, over-the-air local broadcasting service is an important governmental interest, and the Supreme Court affirmed that determination.[86] Digital cable carriage is essential to securing the future of local television stations and ensuring that the vast majority of Americans who subscribe to cable – as well the significant minority that continues to rely on free, over-the-air reception – are not deprived of the benefits of local digital broadcast stations that, unlike cable programmers, are charged with serving their communities of license and the public interest. Finally, the governmental interest in promoting a rapid digital transition further justifies the incidental burden on cable programmers that have to compete for carriage on cable systems.

Discovery's argument also cannot stand because cable programmers are not required to produce HDTV programming, and there is no guarantee that they will do so. Only broadcasters are *required* to transmit DTV signals, and thus it is broadcasters on whom the Commission must rely to spearhead the transition. If the Commission does not require carriage of digital broadcast signals, there is no guarantee that there will be any DTV programming on cable, and it is much more likely that consumer incentives to purchase DTV sets will be *lower* than if carriage of at least some DTV signals is assured.

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[86] *Turner II*, 520 U.S. at 215-216 ("must carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable").

3. Congress Has Determined That Cable Carriage Of Digital Television Signals Is Needed To Serve The Important Governmental Interests Underlying The 1992 Cable Act.

A few cable operators assert that Congress' goal of preserving over-the-air broadcasting services does not apply in the digital context because Congress was concerned only with protecting the "existing" or "regular" analog broadcast television service, not new digital services.[87] They argue that the goal of promoting the DTV transition cannot support the constitutionality of digital must-carry requirements because that goal was not identified when Congress enacted the *1992 Cable Act*.[88] These arguments essentially ask the Commission to read Section 614 (b)(4)(B) out of the Communications Act. As explained in Section II-A above, this provision requires the Commission to adapt its must-carry rules to accommodate the transition to digital television. Through express statutory language, Congress made clear that its interest in preserving free, over-the-air television service was not limited to the analog service. Rather, the must-carry scheme is intended to ensure the continued provision of the local television broadcast service, and its attendant public benefits, as local stations transition to digital television service.

Moreover, as discussed above in Section II-A-1, the Commission has the authority to make predictive judgments that take into account the importance of cable carriage requirements to the digital transition as it implements its statutory obligations to

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[87] *See Discovery Comments*, at 16; *HBO/TBS Comments*, at 13-18.

[88] *See, e.g., Ameritech Comments*, at 10 n.21; *MediaOne Comments*, at 41-45; *NCTA Comments*, at 26-27; *Time Warner Comments*, at 35-39.

manage the DTV transition in the public interest and extend the cable carriage rules to DTV signals.[89]

B. Digital Must-Carry Requirements Would Not Violate The Fifth Amendment.

Time Warner Cable and NCTA argue that digital must-carry requirements would raise serious constitutional concerns under the Fifth Amendment because requiring cable operators to transmit digital broadcast signals over their systems would constitute a taking of property without just compensation. These arguments rest principally on the assertion that requiring cable operators to transmit DTV signals amounts to a "permanent physical occupation authorized by the government," and therefore is a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*[90]

The problem with this argument is that the involuntary transmission of DTV signals over cable is fundamentally different from the "physical occupations" recognized as *per se* takings by *Loretto* and other cases. The cases make clear that the actual *physical* invasion of the owner's property is the linchpin of a *per se* taking. In *Loretto*, the Supreme Court found that a cable company's installation on the roof of a building constituted a

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[89] Congress too had the authority to act preemptively in determining that cable carriage requirements should be extended to digital signals. *See Turner II*, 520 U.S. at 212 ("A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. 'An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly.' As a Senate Committee noted in a Report on the Cable Act, 'we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational prediction of the consequences of inaction and of the effects of regulation in furthering governmental interests.'") (internal citations omitted).

[90] 458 U.S. 419, 426 (1982); *Time Warner Comments*, at 28; *NCTA Comments*, at 34. NCTA also relies on *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1996), discussed below.

permanent physical invasion of the building owner's property, and therefore that a state law allowing the installation of such equipment upon payment of a nominal fee was a *per se* taking under the Fifth Amendment. The Court explained that "Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a *direct physical attachment* of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall."[91] In finding an unconstitutional taking, the Court emphasized that its decision turned on the fact that the law authorized the placement of equipment *belonging to another party* on the real property of the building owner.[92]

Similarly, in *Bell Atlantic Corp. v. FCC*, the court found a substantial Fifth Amendment question where FCC regulations required the "physical co-location" of competitive access providers ("CAPs") and their circuit terminating equipment in the central offices of local exchange carriers ("LECs"). The constitutionality of "virtual co-location," in which the LEC owns and maintains the circuit terminating equipment but the CAP designates the equipment to be used and strings its own cable to an off-site interconnection point, was not at issue, but the Court distinguished it from physical co-location in making its

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[91] *Loretto,* 458 U.S. at 438 (emphasis added).

[92] *Loretto,* 458 U.S. at 440 n.19. In his Constitutional Law treatise, Professor Laurence Tribe explains:

> [T]he majority concedes that its analysis turns upon the fact that the CATV company, rather than the landlord, *owns* the offending installation. The Court claims that its holding does not affect the state's power to require landlords to provide such things as mailboxes, smoke alarms, and utility connections. The reason is that, although the expense in those situations is imposed directly on the landlord, and her dominion over the property is certainly impaired, *she owns the installation*, albeit unwittingly.

Laurence Tribe, *American Constitutional Law* 603 (2nd ed. 1988).

Fifth Amendment finding: "Under either virtual or physical co-location the CAP physically connects to the LEC network by a cable that runs to circuit terminating equipment in the LEC office. The difference between the two schemes is a difference in ownership and right of occupancy; under virtual co-location the LEC owns and operates the circuit terminating equipment, whereas under physical co-location the CAP owns the equipment and enjoys a right to occupy a portion of the LEC office in order to maintain the equipment."[93]

The transmission of digital broadcast signals over a cable system is distinguishable from the "physical occupation" involved in these cases. Digital carriage requirements would not permit broadcasters to place any "fixed structure" on cable operators' physical plants.[94] Rather, they would merely impose a reasonable requirement on cable operators to use property they own and maintain to transmit transitory broadcast signals at the same time they transmit numerous other signals. Indeed, broadcast signals are more like the electromagnetic fields found not to be covered by *Loretto* in *United States v. 0.59 Acres of Land*,[95] than like the physical equipment placed on owners' real property in *Loretto* and *Bell Atlantic*.[96]

If the Commission were to refuse to adopt digital cable carriage requirements because of Fifth Amendment concerns, it would extend *Loretto's* meaning far beyond its

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[93] 24 F.3d at 1446.

[94] *Loretto*, 458 U.S. at 437.

[95] 109 F.3d 1493, 1497-98 (9th Cir. 1997).

[96] Other cases relied on by NCTA and Time Warner are similarly inapplicable to digital must-carry requirements. *FCC v. Florida Power Corp.*, 107 S. Ct. 1107 (1987), like *Loretto* and *Bell Atlantic*, involved the placement of tangible, physical equipment onto another party's property. And in *Midwest Video Corp. v. FCC*, the Eighth Circuit expressly declined to rest its decision on constitutional grounds, and the Supreme Court on certiorari similarly based its holding on grounds other than the Fifth Amendment. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

intended scope. The Supreme Court emphasized in *Loretto* that its holding was a "very narrow" affirmation of the traditional principle that a "permanent physical occupation" of property is a taking.[97] The decision was not meant to undermine "the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property."[98] Here, where a must-carry requirement would not create a "physical" occupation and there is a long history of the imposition of "appropriate restrictions" on cable operators' use of their system capacity, the Commission's abrogation of its statutory obligation to adopt digital cable rules for Fifth Amendment reasons would directly contradict *Loretto*.

Where no permanent physical occupation is present, the determination of whether an economic regulation governing the use of property constitutes a taking depends on an "ad hoc" analysis of the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action.[99] Under this analysis, it is clear that must-carry requirements would not constitute a taking. Cable systems have been subject to regulation (including must-carry and public access requirements) for decades, and they thus cannot (and do not) contend that they have any reasonable, investment-backed expectation in the free use of all of their channels. Further, neither NCTA nor Time Warner claims that digital must-carry requirements would have a significant adverse economic impact on cable operators. Indeed, they could not make such an argument because the burden of digital must-carry will be quite modest, in terms of

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[97] *Loretto*, 458 U.S. at 441.

[98] *Id.*; *see also* Tribe, at 604.

[99] *Loretto*, 458 U.S. at 432; *Penn Central Transportation Co. v. NYC*, 438 U.S. 104, 124 (1978).

capacity and otherwise. With respect to the character of the governmental action, digital must-carry requirements would be, as shown above, a reasonable exercise of the Commission's authority that would serve important governmental interests in a myriad of ways.

Rather than subjecting digital must carry requirements to the appropriate ad hoc inquiry, which would demonstrate their constitutionality under the Fifth Amendment, NCTA and Time Warner urge the Commission to wrestle digital must carry requirements into a *per se* takings analysis. They ask the Commission to interpret the Fifth Amendment in a manner that would go far beyond its current parameters, and, if adopted, would bring many of the Commission's (and other agencies') regulatory policies into question. The Commission should not be led astray.

IV. THE COMMISSION HAS THE AUTHORITY TO ESTABLISH PRINCIPLES FOR DIGITAL COMPATIBILITY.

Also at issue in this proceeding is whether and how the Commission should take steps to ensure the interoperability of cable systems and digital devices such as DTV receivers and DVD players.[100] None of the comments challenges the Commission's authority to address digital compatibility issues, and the Commission has long assumed that it has such authority.[101] Section 614(b)(4)(B) authorizes the Commission to make "any changes" necessary to "ensure cable carriage" of advanced signals. This encompasses the

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[100] *Notice*, 13 FCC Rcd at 15108-09.

[101] *See MSTV Comments*, at 10 n.28 (citing past FCC expressions of intent to address digital compatibility issues and ensure that digital signals could be carried through cable systems to consumers).

authority to address the technical ability of cable systems to transmit DTV signals to consumers.[102]

The comments evince a broad consensus that the Commission must at least set forth principles to shape and encourage the industry standard-setting process that must function if digital compatibility is to become a reality. Several broadcasters and equipment manufacturers asked the Commission to take an active role in encouraging the standard-setting process;[103] some urged the Commission to set deadlines for the completion of standard-setting efforts.[104] Cable operators likewise acknowledged that the resolution of digital compatibility issues is necessary for cable carriage of digital signals to work.[105] Some commenters went even further and asked the Commission to set standards directly.[106]

As MSTV and others explained in their initial comments, the harmonization of digital standards and the establishment of basic principles of digital/cable compatibility are critical to the success of digital television.[107] Without standards and the resulting

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[102] Although Section 624A of the Communications Act appears to limit the Commission's standard-setting authority to allow only "narrow technical standards that mandate a minimum degree of common design and operation," 47 U.S.C. § 544a(c)(2)(D), this provision "does not preclude the commission from developing or enforcing standards for telecommunications networks." H.R. Rep. No. 204, 104th Cong., 1st Sess. 111 (1996). In any event, the facilitative role MSTV asks the Commission to play in connection with the adoption of digital compatibility standards would not run afoul of the statutory limitation.

[103] *See, e.g.*, *NAB Comments*, at 46-47; *Morgan Murphy/Cosmos Comments*, at 14; *CEMA Comments*, at 19; Comments of Mitsubishi Electric America, CS Docket No. 98-120, at 2 (Oct. 13, 1998); Comments of Philips Electronics North America Corp., CS Docket No. 98-120, at 13-14 (Oct. 13, 1998).

[104] *See, e.g.*, *MSTV Comments*, at 43; *Broadcast Group Comments*, at 18.

[105] *See, e.g.*, *Adelphia Group Comments*, at 22-25; *NCTA Comments*, at 39.

[106] *See* Comments of Sinclair Broadcasting Group, Inc., CS Docket No. 98-120, at 7-8 (Oct. 13, 1998).

[107] *See, e.g.*, *MSTV Comments*, at 40-44; *Broadcast Group Comments*, at 17; *Morgan Murphy/Cosmos Comments*, at 14.

compatibility between cable systems and digital devices, consumers will have difficulty accessing digital signals or will have to incur unnecessary expense in order to do so. If consumers become frustrated because expensive DTV receivers and other digital equipment lack full functionality when connected to cable, the DTV transition will be imperiled.

Those commenters that oppose Commission action with respect to digital compatibility standards primarily argue that it is not necessary because the industries are making progress on developing standards.[108] MSTV agrees that in the first instance industry bodies, rather than the Commission, should develop the specific technical standards that are needed. However, although it is true that industry standard-setting bodies are working on digital compatibility issues, the fact is that they have been considering these issues for months, even years in some instances, and few concrete results have emerged. The recent progress in the development of the IEEE 1394 standard occurred only after the Commission stepped in and urged the cable and consumer electronics industries to act.[109] In these circumstances, it is clear that the private standard-setting process will not function productively and expeditiously without effective involvement on the part of the Commission. The Commission has mandated an aggressive schedule for the rollout and transition to digital broadcast service; compatibility standards are critical to the success of the mandated transition; and the competing interests of the industries involved have largely stalemated the industry standard-setting process. Thus, the Commission must step in to stimulate and facilitate the standard-setting process.

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[108] *See, e.g.*, *HBO/TBS Comments*, at 32-33; Comments of General Instrument Corporation, CS Docket No. 98-120, at 2 (Oct. 13, 1998); *Microsoft Comments*, at 21-22.

[109] *See* Letter from Chairman William E. Kennard to Decker Anstrom, President and CEO, NCTA, and Gary Shapiro, President, CEMA, Aug. 13, 1998.

MSTV and the NAB proposed a mechanism through which the Commission could do so in a recent letter to the Commission concerning implementation of cable interface standards.[110] That letter called on the Commission to establish an inter-industry group, chaired by one of the Commissioners, to facilitate the completion of current standard-setting processes and the widespread implementation of digital/cable interoperability. We are pleased that the Commission has essentially accepted this suggestion with the initiation of a series of "inter-industry forums to discuss DTV compatibility and operability issues" under the leadership of OET Bureau Chief Dale Hatfield.[111] We share the Chairman's hope that through these forums "government can play a facilitative role by providing a neutral but knowledgeable forum in which industry participants can come together to exchange information and points of view."[112] We urge the OET Bureau to commence these discussions promptly so that any momentum created by the completion of the IEEE 1394 standard will not be lost.

V. OTHER ISSUES

1. Retransmission Consent and Digital Carriage. Several cable operators and programmers ask the Commission to prohibit broadcasters from using retransmission consent negotiations for analog signals as a basis for obtaining carriage of digital signals.[113]

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[110] *See* Letter from Edward O. Fritts and Margita E. White to Chairman William E. Kennard, Nov. 9, 1998 (filed in CS Docket No. 98-120).

[111] *See* Remarks of William E. Kennard, Chairman, FCC, to the "Dawn of Digital Television" Summit Meeting, Nov. 16, 1998.

[112] *Id.*

[113] *See, e.g.,* Comments of Armstrong Holdings, Inc. and Inter Mountain Cable, Inc., CS Docket No. 98-120, at 37-38 (Oct. 13, 1998); *GTE Comments*, at 5; Comments of John D. Pellegrin, Chartered, CS Docket No. 98-120, at 6 (Oct. 13, 1998); Comments of the Small Cable Business Association, CS Docket No. 98-120, at 27-28 (Oct. 13, 1998).

They contend that allowing broadcasters this freedom would lead to cable operators' having to carry more broadcast signals than is "reasonable" under the *Turner II* standard. Yet cable operators have strenuously argued that the Commission should stay out of digital cable carriage issues and let the market determine how digital broadcast signals will be carried on cable. Here they ask the Commission to intervene in the market to remove what may be the only market-based leverage that broadcasters have to obtain carriage in the early days of digital broadcasting when equipment penetration is low and audiences are small.

Congress established the must-carry/retransmission consent framework to permit the market to work when the participants are on relatively equal footing, but to correct the market malfunction created by cable's gatekeeper role when necessary. This framework strikes a reasonable balance between allowing the market to work and preventing anti-competitive conduct when the market does not work, and the Commission should not disrupt this balance in the digital context by constraining broadcasters' right to negotiate favorable retransmission consent terms.

2. Digital Tier Regulation. The *Adelphia Group Comments* propose rules that would allow cable operators to create separate digital tiers that would not be subject to rate regulation.[114] Regardless of whether it permits cable operators to group digital signals on a separate tier, the Commission should not exempt digital tiers from appropriate rate and other regulations. Among other considerations, expensive digital packages will discourage widespread consumer investment in DTV.

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[114] *Adelphia Group Comments*, at 32.

VI. CONCLUSION.

For the foregoing reasons, MSTV urges the Commission to proceed quickly to review the comments and reply comments filed in this proceeding and issue a Report and Order resolving the many critical issues raised therein. The success of the digital transition depends on the swift adoption of rules that will afford broadcasters and other participants in the transition some certainty about the broadcast/cable relationship during the transition and will structure that relationship so that consumers will have prompt access to a multiplicity of local DTV signals and local broadcasting will be sustained through the transition.

Respectfully submitted,

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